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No.

In The

Supreme Court of the United States

October Term, 1997

BARBARA DUNCAN, personally and on behalf of her deceased child, BABY BOY SCOTT,

Petitioner,

vs.

TOGO D. WEST, JR., Secretary of the Army,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

MICKALE CARTER
Attorney for Petitioner
PSC 37 Box 2277
APO AE 09459

148312

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

72 pp

QUESTIONS PRESENTED

1. Does the federal court have jurisdiction over Barbara Duncan's claims which arise out of the substandard medical care that she received as a military dependent at an American Army medical facility located in Germany?

2. To what extent does 10 U.S.C. § 2735 limit Administrative Procedures Act judicial review, 5 U.S.C. § 702, of the Secretary of the Army's determinations under the Military Claims Act ("MCA"), 10 U.S.C. §§ 2731-2737?

3. Is there a rational basis for the disparity in the way military dependents' claims arising out of substandard medical care received in Army medical facilities are adjudicated, based solely upon where the Army medical facility is located, i.e., stateside vs. overseas; or in the alternative, should this Court revisit its holding in *United States v. Spelar*, 338 U.S. 221 (1949), which held that for the purposes of the Federal Tort Claims Act ("FTCA") 28 U.S.C. §§ 2671-80, 1346(b), American leased airfields overseas come within that Act's exclusion of claims that arise in a "foreign country"?

4. Do the procedures afforded by the Secretary of the Army, promulgated pursuant to the MCA, adequately provide for due process as required by the United States Constitution?

5. What is the remedy when the promise of quality medical care to military dependents, pursuant to 10 U.S.C. §§ 1071-1106, is breached in an Army medical facility located overseas?

6. Did the Secretary of the Army violate the governing statute, i.e., the MCA, when he imposed a negligence requirement as a prerequisite to recovery in some MCA claims?

7. Did the Secretary of the Army violate the governing statute, i.e., the MCA, when he applied the independent contractor exception of the FTCA to MCA claims?

8. Did the Court of Appeals and the District Court err in finding as a fact that the Army's civilian doctor was an independent contractor based solely upon the bald assertion of such status by the Secretary of the Army?

9. Did the Secretary of the Army violate his own regulations in processing Barbara Duncan's claim by: (a) refusing to provide her with a copy of the expert opinion upon which he relied in rejecting her claim (assuming such report actually exists), stating that the requested information was privileged; (b) refusing, without a stated justification, to provide a copy of the contract of employment of the Army's civilian doctor; and/or (c) by failing to apply the prevailing common law standard to determine whether the standard of care had been breached or to determine whether the Army was liable for the conduct of its civilian doctor by operation of common law principles including apparent authority?

10. Did the Secretary of the Army violate 28 U.S.C. § 2680(k)(1), which prohibits application of the FTCA to any claim arising in a foreign country, *inter alia*: (1) by promulgating 32 C.F.R. § 536.24(k) which states: "The types of claims not payable under the FTCA [] are not payable under [the MCA]"; or 32 C.F.R. § 536.24(k)(2) which states: "The foreign exclusion in 28 U.S.C. § 2680(k) does not apply to claims under Secs. 536.20 through 536.35"; and/or (2) by applying the same procedural regulations to both FTCA and MCA claims?

11. Is the Secretary of the Army estopped from taking the position that the provisions of the FTCA do not apply to Barbara Duncan's claim in light of the fact that he applied FTCA provisions to her claim?

12. Did the Secretary of the Army, in applying 10 U.S.C. § 2733 rather than § 2734, apply the correct subsection of the MCA to Barbara Duncan's claims?

PARTIES TO THE PROCEEDINGS

There are no other parties than those listed in the caption.

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Appendix A — Opinion Of The United States Court Of Appeals For The Fourth Circuit Decided June 24, 1998 ..... 1a

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Petitioner Barbara Duncan, on her own behalf and on behalf of her deceased child, Baby Boy Scott, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, *Duncan v. West*, Civ. No. 97-1876, is an unpublished opinion. (App. A). The opinion of the District Court is published at *Duncan v. West*, 965 F. Supp. 796 (E.D. Va. 1997). (App. B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit ("Court of Appeals") was entered on June 24, 1998. The Court of Appeals had jurisdiction over this action pursuant to 28 U.S.C. § 1291.

There is federal court subject matter jurisdiction over this action because it meets the "case or controversy" requirement of the United States Constitution. U.S. Const. art. III § 2. Claiming violation of due process and equal protection, it arises under the United States Constitution. Claiming violation of federal statutes and regulations, it arises under the laws of the United States. 28 U.S.C. § 1331. The federal courts also have subject matter jurisdiction over this action because it requests that the court compel an employee of the United States to perform a duty owed to the plaintiff/petitioner. 28 U.S.C. § 1361.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Federal Statutes

Military Claims Act
10 U.S.C. §§ 2731-2737

Relevant provisions at App. C.

Federal Tort Claims Act
28 U.S.C. §§ 2671-80, 1346(b)

Relevant provisions:

2671:

> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

2680(k):

> The provisions of this chapter [Chapter 171] and section 1346(b) of this title shall not apply to . . . (k) [a]ny claim arising in a foreign country.

Army Regulations

Claims against the United States
32 C.F.R. §§ 536.1-536.97

Relevant provisions at App. D.

STATEMENT OF THE CASE

A. Factual Background.

In early September, 1991, Barbara Duncan, Petitioner herein, the wife of an active duty soldier stationed in Germany, sought treatment for appendicitis at an American Army medical facility in Germany on the Army post where they lived; U.S. Army Health Clinic (4th General Dispensary), Darmstadt, Federal Republic of Germany ("Army Clinic"). She went to the clinic on two separate occasions complaining of severe lower abdominal pain. At that time she was 5 months pregnant with her first, and what was to become, her only child. Both a military member doctor, Dr. Pylman, and a civilian doctor, Dr. Asemota, saw her at the Army Clinic and both failed to diagnose and treat her appendicitis.

Dr. Pylman saw her on September 3, 1991. After only a cursory examination, he diagnosed her condition as the flu. He gave her pain medication and sent her home.

On September 5, 1991, Duncan called Dr. Pylman because the pain had not improved. Dr. Pylman told her that he was too busy to see her and instructed her to go to see Dr. Asemota, the civilian doctor at the Army Clinic.

The civilian doctor's office was next to the military doctor's office at the Army Clinic. As with the visit to the military

member doctor on the 3rd, the preliminary evaluation, i.e., blood pressure, temperature, etc., on the 5th was accomplished by military member personnel before Duncan was seen by the civilian doctor. The civilian doctor's note for the visit was written on the back side of the military doctor's note on a government form and placed in Duncan's official Army medical record. The civilian doctor used the lab facilities at the Army clinic. There was no placard anywhere which indicated that the civilian doctor was not an Army employee. Duncan filled out no Civilian Health and Medical Program of Uniformed Services ("CHAMPUS") forms; nor was she otherwise billed or sent any paperwork for the office visit to the civilian doctor by CHAMPUS or the civilian doctor.

Pursuant to the generally accepted standard of care, vaginal and rectal exams and complete blood work are *mandatory* when a woman presents complaining of abdominal pain. This standard is doubly mandatory when the women is pregnant as was Barbara Duncan.

Although Duncan complained to both doctors of severe lower abdominal pain, neither doctor took the time to perform a vaginal or a rectal examination. Neither ordered any blood work whatsoever. As a consequence, neither accumulated the information necessary for a diagnosis of appendicitis.

As a result of this negligent failure to diagnose and properly treat her appendicitis, Barbara Duncan's appendix ruptured. She developed peritonitis which resulted in the premature termination of her pregnancy and the death of Baby Boy Scott who was about 5½ months gestation.

Due to the scar tissue which the peritonitis caused to form around her organs, Duncan is now unable to have children. The scar tissue also is strangling her bladder and her intestines which causes her to experience serious urinary and bowel problems.

B. The Proceedings Below.

Duncan went to an attorney in Germany who timely filed a claim against the Army on August 31, 1993. On December 21, 1994, her claim was denied. In denying the claim, the Secretary of the Army (Secretary), without indication of factual basis or discussion, stated the conclusion that the civilian doctor that worked at the Army Clinic was either a "contract physician" or a "CHAMPUS partner" and thus not an "employee" of the Army and as such, the Army was not liable for his conduct.

The Secretary also, again without discussion or indication of the grounds therefor, concluded that "[w]hile it is true that the latter stages of pregnancy can obscure the findings in acute appendicitis, Dr. Pylman's evaluation and assessment appear appropriate under the circumstances."

Duncan decided to appeal the denial of her claim. By the time her claim had been denied, a year and four months after it was filed, her husband had been reassigned and they had moved back to the States. She contacted a Virginia lawyer to handle her appeal.

Her appeal was filed on May 1, 1995. On October 22, 1996, a year and a half later, the Secretary denied the appeal of her claim and disapproved her claim. The Secretary gave no reason for the denial. He merely stated, "After careful consideration of the evidence, the Army Deputy General Counsel (Ethics and Fiscal), has denied the appeal and disapproved the claim."

Duncan filed her complaint in federal district court on November 14, 1996, seeking declarative and injunctive relief. She asked for relief on three distinct grounds: (1) erroneous and unsupported factual findings; (2) violation of federal statutes and regulations; and (3) violation of the United States Constitution.

Duncan made the following allegations of violation of federal statutes and regulations:

1. 10 U.S.C. § 2734, rather than 10 U.S.C. § 2733, which was applied by the Secretary, is applicable to her claim.

2. A finding of negligence on the part of the Army employee as a condition precedent to recovery, as set forth in Army regulations, 32 C.F.R. §§ 536.23(a)(1) and 536.6, is a violation of the governing statute, 10 U.S.C. §§ 2731-2737.

3. The Secretary's application of the Federal Tort Claims Act's ("FTCA") exclusion of independent contractors, is a violation of 28 U.S.C. § 2680(k).

4. The Secretary violated his own regulation, 32 C.F.R. § 536.27(b), which states that claims arising in a foreign country will be assessed by referring to the general principles of tort law common to the majority of the United States jurisdictions in that:

> a. The Secretary did not apply the prevailing common law standard of care for treating women who present complaining of lower abdominal pain, i.e., vaginal and rectal exams as well as blood work are *mandatory*.
>
> b. The Secretary did not apply the common law to determine whether the Army was liable for the conduct of Dr. Asemota, the civilian doctor at the Army Clinic.

5. The Secretary violated his own regulations which require that the claimant be informed of the reasons for denial of her claim, 32 C.F.R. § 536.11(c), as well as have access to

evidence in the claim file which was relied upon to deny her claim, 32 C.F.R. § 536.32(b)(4).

Duncan averred that the Secretary violated her due process rights by: (1) promulgating regulations which violate the governing statutes; (2) she was not given sufficient information as to why the Secretary denied her claim; and (3) the Secretary refused to give her a copy of the documents which formed the basis of his opinion as to the employment status of Dr. Asemota or the documents upon which he relied in concluding that Dr. Pylman's care was appropriate under the circumstances.

Duncan averred that the Secretary should be estopped from taking the position that the provisions of the FTCA do not apply to her claim in light of fact that the Secretary applied some of the FTCA's provisions when he adjudicated her claim even though the FTCA expressly prohibits such application.

Duncan finally alleged that her equal protection rights are violated by the disparate treatment of military dependents who receive substandard care in Army medical facilities overseas as compared with those who receive substandard care in Army medical facilities in the United States.

The Secretary brought a motion to dismiss for lack of federal jurisdiction. The Secretary claimed that 10 U.S.C. § 2735 precludes judicial review of all of Duncan's claims. The Court granted the motion, and on May 9, 1997, holding that it had no subject matter jurisdiction, dismissed the case with prejudice.

On June 4, 1997, the District Court issued its written opinion. (App B). After reciting the Secretary's version of the facts, it concluded that § 2735 precludes judicial review except for "substantial" claims of violation of the Constitution. It

further concluded that the Secretary properly construed Duncan's claim as one under § 2733 rather than § 2734. The court finally concluded that "Duncan has not demonstrated a substantial violation which might fall within the 'constitutional exception' to § 2735."

She appealed to the Court of Appeals for the Fourth Circuit (Court of Appeals). The Court of Appeals, on June 24, 1998, affirmed. (App. A). Like the District Court, it recited the Secretary's version of the facts. In addition to holding that there is no federal court jurisdiction over Duncan's claims, it held the following: (1) the language "notwithstanding any other provision of law" of § 2735 precludes judicial review under the Administrative Procedures Act ("APA") 5 U.S.C. § 702 (1994); (2) § 2733, rather than § 2734, is "clearly applicable to Duncan's claim"; (3) Duncan's claims that can be construed as averring that the Secretary exceeded his authority, are without merit; (4) it is not a violation or in excess of the scope of authority for the Secretary to limit relief to those claims which show that military personnel were negligent in causing the injury; (5) Duncan's contention that the Secretary did not apply the prevailing common law standard is merely an attempt to have the court review the merits of her claim; (6) the civilian doctor was in fact a CHAMPUS doctor and thus an independent contractor; (7) the Secretary had authority to exclude independent contractors from the definition of "civilian officers or employees"; (8) Duncan received all the process she was due in that she received notice of the reasons for the denial of her claim, and she submitted arguments, expert opinions and other materials; and (9) there is a rational basis for granting judicial review under the FTCA while not providing the same opportunity to claimants proceeding under the MCA.

REASONS FOR GRANTING THE WRIT

I.

THE ONLY HOPE THAT MILITARY DEPENDENTS HAVE TO ENFORCE THE CONGRESSIONAL MANDATE OF QUALITY MEDICAL CARE OVERSEAS IS JUDICIAL REVIEW OF THEIR MALPRACTICE CLAIMS.

Military dependents overseas are the unsung heroes of American military readiness. They leave friends and family and put their careers on hold in order to accompany their military member spouse on his/her overseas assignment. They do not get any remuneration from the government for the sacrifices that they make. All they get is the promise that they will be provided with quality medical care while they are overseas. The holding of the Court of Appeals renders that promise a nullity.

Pursuant to the Court of Appeal's holding, the Army has unilateral power to determine whether a military dependent can recover on a medical malpractice claim which arises overseas. That means that the Army decides, without oversight, whether it has adequately carried out the Congressional mandate to provide quality medical care to its overseas dependents. Granting the Army such power is unwise not only because it is contrary to the American principle of separation of power, but also because it invites abuse.

Chapter 55, Medical and Dental Care, of Title 10, Armed Forces, 10 U.S.C. §§ 1071-1106, requires the military to provide medical care, *inter alia*, to military dependents. Section 1072(2) defines dependents to include the spouse and unmarried minor children of a military member.

Section 1071 states that the purpose of Chapter 55 is to:

> create and maintain high morale in the uniformed services by providing an improved uniform program of medical and dental care for members and certain former members of those services, and for their dependents.

Indeed,"[p]eacetime medical care for nonactive duty beneficiaries — dependents and retirees — is a crucial part of the military compensation package." 1987 U.S. Code Cong. & Admin. News 1018, 1224.

Since early in the 19th century, the Armed Forces have provided medical care for the dependents of active duty members. This historic practice was recognized in the case of Army dependents by statute in 1884. 1966 U.S. Code Cong. & Admin. News 3082, 3105.

In 1966 Congress amended Title 10 in order to provide dependents with health care which is "more comparable to those offered in the health care plans of industry and labor, and those offered under the Federal employees health benefits program." Id.

The promise of quality medical care to military dependents has meaning only if there is some method of oversight of the Army's compliance with the Congressional mandate. When the care is provided by the Army stateside, the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-80, 1346(b), affords a viable control. In an FTCA case the Army medical care at issue is reviewed by a neutral arbiter, i.e., a federal district judge.

However, pursuant to the holding of the Court of Appeals, there is no similar safeguard when the medical care at issue is

provided overseas. In that case, the Army has exclusive, absolute, power to determine whether it has kept the promise. Such power eviscerates the Congressional promise of quality medical care. Only judicial review can breathe life into the promise.

II.

THERE IS NO RATIONAL BASIS FOR THE DISPARITY IN THE TREATMENT BETWEEN ARMY DEPENDENTS WHO RECEIVE SUBSTANDARD CARE IN ARMY HEALTH CARE FACILITIES IN THE UNITED STATES AND ARMY DEPENDENTS WHO RECEIVE SUBSTANDARD CARE IN ARMY HEALTH CARE FACILITIES OVERSEAS.

Military dependents who receive substandard care at Army medical facilities located stateside have a right to *de novo* review of their claim against the Army by a federal district court judge pursuant to the FTCA. However, when that same military dependent receives the substandard care at Army medical facilities located overseas, pursuant to the holding of the Court of Appeals, she has no right of judicial review whatsoever. Furthermore, the Court of Appeals concluded, without discussion, that there is a rational basis for this disparate treatment. However, a fair review reveals just the opposite.

The standard for determining whether this disparate treatment passes Constitutional muster is whether the classificatory scheme "rationally advances a reasonable and identifiable government objective." *Schweiker v. Wilson*, 450 U.S. 221, 235 (1981).

Factors indicating that there is *no* "reasonable and identifiable government objective" for the disparate treatment

at issue here include: (1) Army dependents reside in foreign countries for the benefit of the Army, i.e., for morale purposes; (2) Congress mandates that the Army provide its dependents with quality medical care irrespective of where the care is provided; (3) The situs of the medical malpractice is an Army medical facility; (4) The Army transfers its medical corps members freely between facilities in the United States and in foreign countries; (5) The Army applies the same regulations to domestic, i.e., FTCA claims, as foreign, i.e., MCA claims. *See* 32 C.F.R. § 536.1-60; (6) The Army has the same interest in adjudication of medical malpractice claims whether they arise in foreign or domestic Army facilities; and (7) Because of the standardization of medical practice throughout the United States, the law applied to determine the standard of care in an MCA case is exactly the same as applied in an FTCA case. *Cf.* 32 C.F.R. § 536.6 with 28 U.S.C. § 2674.

This case is distinguishable from *Poindexter v. United States*, 777 F.2d 231, 235 (5th Cir. 1985). In that case, the plaintiff alleged disparity in handling MCA claims between the services, i.e., the Army vs. the Air Force. It is also distinguishable from *Hata v. United States*, 23 F.3d. 230, 234 (9th Cir. 1994), and the cases cited therein, because the claims in those cases were based upon due process, not equal protection, as in the instant action.

The court should refrain from following the spurious holding of the Eighth Circuit in *Schneider v. United States*, 27 F.3d 1327 (8th Cir. 1994), which, like the Court of Appeals in the instant action, merely stated as a tautology his conclusion that there is a rational basis for the disparate treatment.

III.

THE COURT BELOW DID NOT FOLLOW *BELL v. HOOD* IN HOLDING THAT THERE IS NO FEDERAL COURT JURISDICTION.

Pursuant to *Bell v. Hood*, 327 U.S. 678 (1946), the general rule is that where the cause of action arises out of federal law, either the Constitution or a federal statute, the federal courts have jurisdiction. There are two exceptions to this general rule which may warrant dismissal of an action: (1) where the federal question claims are immaterial to the cause of action and are brought for the sole purpose of obtaining federal jurisdiction; and (2) where the federal claims are wholly insubstantial and frivolous. *Id.* at 681-82.

In the case at bar, as in *Bell v. Hood*, it is undisputed that the allegations involving the federal statutes and the Constitution form the basis of Duncan's lawsuit. Thus, Duncan's claims overcome the first hurdle to district court jurisdiction. In order to assess the second hurdle to jurisdiction, the Court must evaluate Duncan's claims to determine if they are all "wholly insubstantial and frivolous."

The Supreme Court clarified when a cause of action is wholly "insubstantial and frivolous" in *Hagans v. Lavine*, 415 U.S. 528 (1974) (White, J.). The Court summed up its analysis, *Id.* at 542-43, stating:

> As was the case in Bell v. Hood, we cannot "say that the cause of action alleged is so patently without merit as to justify, even under the qualifications noted, the court's dismissal for want of jurisdiction." [Bell v. Hood, 327 U.S.] at 683. Nor can we say that the petitioners' claim is "so insubstantial,

> implausible, foreclosed by prior decisions of this Court or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits." Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666-667 (1974). (Citations omitted.)

Duncan's statutory, regulatory and Constitutional claims are not foreclosed by prior decisions of the Supreme Court. Furthermore, Duncan's claims are not wholly insubstantial or obviously frivolous. Indeed, there is a sound basis for each of Duncan's claims. *Bell v. Hood* and *Hagans* require reversal of the Court of Appeals.

IV.

THE COURT BELOW DID NOT FOLLOW *HARMON*, *SHAUGNESSY*, OR *LINDAHL* IN HOLDING THAT § 2735 CUTS OFF JUDICIAL REVIEW.

The Court of Appeals affirmed the District Court's holding that the "final and conclusive" language of § 2735 precludes judicial review of all claims except for "'substantial' constitutional claims." This holding is contrary to at least three Supreme Court decisions. *See Harmon v. Brucker*, 355 U.S. 579 (1958) (per curium), *Shaughnessy v. Pedreiro*, 349 U.S. 49 (1955) and *Lindahl v. O.P.M.*, 470 U.S. 768 (1985).

It is noteworthy that in not one of the cases relied upon by the lower courts in holding that there is no federal jurisdiction over Duncan's statutory violation claims was there a claim of violation of a statute. Those cases are simply inapposite to the issue of whether § 2735 precludes judicial review of claims that the Secretary violated federal law in the course of his adjudication of Duncan's MCA claim.

The Supreme Court in *Harmon* addressed a circumstance, such as this one, in which it was claimed that the finality statute barred claims that the Secretary had violated statutes in the course of the administration of a claim. The District Court dismissed the case for want of subject matter jurisdiction based upon 38 U.S.C. § 693h, which states that the findings of the Army Review Board "[shall] be final subject only to review by the Secretary of the Army." The Court of Appeals affirmed. *Harmon*, 355 U.S. at 580-81.

In reversing the lower court, the Supreme Court pronounced the general rule: "Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." *Id.* at 581-82. The Court held that if the Secretary had exceeded his powers then "his actions would not constitute exercises of his administrative discretion, and, in such circumstances as those before us, judicial relief from this illegality would be available." *Id.* at 582.

Harmon is determinative in the instant action. Duncan, as did Harmon, alleged that the Secretary violated statutes, regulations, and the Constitution. The Supreme Court held that the finality statute in *Harmon*, which has language which is less ambiguous than that of § 2537, i.e., "final and conclusive" vs. "final subject only to review by the Secretary of the Army", did not preclude judicial review of claims of illegal action. The District Court should proceed on the merits of Duncan's claims.

In *Shaughnessy v. Pedreiro*, 349 U.S. 49 (1955), the Supreme Court addressed the impact of the APA on finality statutes. The Court pointed out that the purpose of the APA was to remove obstacles to judicial review. It stated, *Id.* at 51:

> It is more in harmony with the generous review provisions of the Administrative Procedure Act to

> construe the ambiguous word "final" in the 1952 Immigration Act as referring to the finality in administrative procedure rather than as cutting off the right of judicial review in whole or in part.

The finality language of § 2735, "final and conclusive", read in the context of the APA, does not cut off the right of judicial review. In line with *Shaughnessy*, this court should conclude that § 2735 merely refers to the finality in administrative procedure.

The Supreme Court in *Shaughnessy* went on to hold that in order for a statute drafted after 1946 to overcome the APA's presumption of judicial reviewability, the statute must do so expressly. *Id.* at 50-51. The issues in this case then becomes whether the language "notwithstanding other provisions of the law" *expressly* cuts off APA review as held by the Court of Appeals.

The Supreme Court in *Lindahl v. O.P.M.*, 470 U.S. 768, 779-80 (1985), gives guidance for determining when Congress intends that a finality statute cut off the right of judicial review as described in the APA. The Court gave two examples of the unambiguous language Congress uses when it intends to cut off APA review. *Id.* at 780 n. 13.

The first, 5 U.S.C. § 8128(b), compensation for work injuries, states:

> The action of the Secretary [of Labor] or his designees in allowing or denying a payment under this subchapter is — (1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

The second, 38 U.S.C. § 211(a), veterans' benefits, [now 511(a)] states:

> [T]he decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

In *Lindahl*, 470 U.S. at 779, the Supreme Court sought to determine what is clear and convincing evidence of Congressional intent that a statute preclude judicial review. The Court held that to make that determination, the court must examine: (1) the express language of the statute; (2) its legislative history; (3) the structure of the statutory scheme; and (4) the nature of the administrative action involved.

The express language of § 2735 does not preclude judicial review. Section 2735 makes no specific mention of the APA or of judicial review. *Cf.* § 2735 with the statues quoted *supra*. Section 2735 does not, as required by the APA, expressly cut off the right to judicial review.

The legislative history indicates Congressional intent that § 2735 make the Secretary's determinations final only as to other agencies. There is only one item of legislative history for § 2735. The legislative history is a 1972 Senate Report on Congressional considerations as to whether to include additional statutes within the purview of § 2735. The report describes Congressional intent of the impact of § 2735.

In discussing the impact of § 2735, the Senate Report states at 1972 U.S. Code Cong. & Admin. News 3106, 3109-10:

> The proposed legislation would be consistent with the cited general policy of preventing other agencies of the government from reviewing and reversing actions on claim settlements of agencies specifically authorized to settle and pay certain claims.

Indeed, the Senate Report specifically states that decisions made pursuant to § 2735 would be subject to appeal: "This does not prevent an appeal of the decision to higher authority as provided in the law." 1972 U.S. Code Cong. & Admin. News 3106, 3108. The "higher authority", as provided in the APA, 5 U.S.C. § 702, is judicial review of adverse agency decisions.

Thus, the legislative history reveals that the Congressional intent of the "final and conclusive" language in § 2735 is to prevent federal executive agencies and officials, such as the Comptroller General, from reviewing and possibly even rejecting the Secretary's settlements of MCA claims.

It is important to note that in not one of the cases upon which the Circuit Court relied in its interpretation of Congressional intent of § 2735, did the court review § 2735's legislative history. Indeed, only one reported opinion does. That case is *Walsh v. United States*, 446 F. Supp. 75, 78 (D. Conn. 1978). Guided by the legislative history and the requirement that there must be clear and convincing evidence to the contrary, *Lindahl*, 470 U.S. at 778-79, the Honorable Chief Judge Clarie held that Congress did not intend that § 2735 prevent judicial review by stating that the decisions of the Secretary were "final and conclusive," but rather was only making those determinations final with respect to administrative review. *Walsh*, 446 F. Supp. at 76. This Court should follow *Walsh*.

V.

THE STATUTORY SCHEME DOES NOT PROVIDE DUE PROCESS GUARANTEES WHICH IS INDICATIVE THAT CONGRESS INTENDED THAT THE RIGHTS OF MILITARY DEPENDENT WHO ARE THE VICTIMS OF ARMY MEDICAL MALPRACTICE OVERSEAS WOULD BE SAFEGUARDED BY JUDICIAL REVIEW.

Procedural due process rules are meant to protect persons "from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978). The rules minimize substantively unfair or mistaken deprivations by enabling persons to contest the basis upon which the State proposes to deprive them of a protected interest. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

Due process requires the following:

1. Notice sufficient to enable the recipient to determine what he must do to prevent the deprivation of his interest, *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970);

2. Hearing at a meaningful time in a meaningful manner, *Armstrong v. Mango*, 380 U.S. 545, 552 (1965);

3. An impartial decision maker, *Goldberg*, 397 U.S. at 271;

4. An opportunity to confront and cross-examine adverse witnesses, *Id.* at 269;

5. "[T]he evidence to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Green v. McElroy*, 360 U.S. 474, 496 (1959) quoted with approval in *Goldberg*, 397 U.S. at 270; and

6. The decision maker's conclusions must rest solely on the legal rules and evidence adduced at the hearing. To show compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence relied upon. *Goldberg*, 397 U.S. at 271.

The statutory scheme and the regulations promulgated by the Secretary for MCA claims do not provide for: (1) a hearing; (2) an impartial decision maker; (3) an opportunity for confrontation and cross-examination; or (4) that the determination must rest on legal rules and evidence adduced at the hearing. *See* 10 U.S.C. §§ 2731-2737, and 32 C.F.R. §§ 536.1-536.60.

Even though the Secretary's regulations require notice of the basis for denial of a claim, § 536.11(c), and disclosure of the government's evidence, § 536.32(b)(4), the Secretary did not comply with either of these regulations.

The only safeguard of a military dependent's due process rights is judicial review of the Secretary's MCA adjudication. Where Congress does not intend judicial review it has provided for procedural safeguard in the governing statute. *Lindahl*, 470 U.S. at 779. *See, e.g.*, procedures for federal worker's compensation, 5 U.S.C. §§ 8124 (hearing), and 8126 (subpoena and examination of witnesses). Because none were provided here, judicial review is necessary.

VI.

THE COURT OF APPEALS' DETERMINATION THAT THE SECRETARY DID NOT CLEARLY VIOLATE A STATUTE WHEN HE APPLIED § 2733 RATHER THAN § 2734 TO DUNCAN'S CLAIM IGNORES *CHEVRON* AS WELL AS § 552(a)(1)(C),(D) OF THE APA.

Section 2734 applies to "any inhabitant of a foreign country." The Secretary has a policy that provides that for the purposes of the MCA, military dependents who live on Army installations overseas are not "inhabitants of a foreign country." The Secretary applied this policy to determine that § 2733 rather than § 2734 of the MCA should be applied to Duncan's claim.

The Court of Appeals held that in doing so, the Secretary did not clearly violate the statute. The court reached that conclusion relying on the definition of "inhabitants" in Black's Law Dictionary. The Court of Appeals not only ignored the Supreme Court's guidance in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), it also ignored the fact that the Secretary's policy concerning "inhabitants of a foreign country" is not published in the Federal Registrar.

Section 552 of the APA requires agencies to make available to the public their rules and procedures as well all substantive rules of general applicability adopted as authorized by law. 5 U.S.C. § 552(a)(1)(C),(D). It states further that "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 5 U.S.C. § 552(a)(1). *See also* 44 U.S.C. § 1507.

The Secretary's policy concerning its interpretation of inhabitant, as that term is used in § 2734, falls within the

purview of § 552. It was not published in the Federal Register as of the date of the accrual of Duncan's cause of action in 1991. Indeed, the Secretary admits that it continues to not be published. Thus, the Secretary's regulation cannot in any way be applied against Duncan.

Where there is no agency regulation, *Chevron*, 467 U.S. at 842-43, instructs the court to interpret the statute. The court would first look at the statute to determine if the intent of Congress was clear. Section 2734 applies to "any inhabitant of a foreign country." The statute then defines "foreign country" to include "any place under the jurisdiction of the United States in a foreign country." 10 U.S.C. § 2734(a).

With its definition of foreign country, Congress revealed its clear intend to include as "any inhabitant" those people who live on military installations overseas. Military installations overseas are "under the jurisdiction of the United States in a foreign country." The people who inhabit military installations overseas are none other than military members and their dependents. Nobody else lives on these installations. Thus, Congress clearly intended that military dependents living on Army installations overseas be included in "any inhabitant of a foreign country" of § 2734.

Also, Congress used an all inclusive word "any" before the word inhabitant. If Congress had intended, in any way, to limit who it considered to be an inhabitant, it would not have prefaced inhabitant with the word "any."

The court and the Army must follow this directive of Congress. Neither has any choice, pursuant to *Chevron*, *Id.*, but to apply § 2734 to all persons who inhabit "foreign countries," including military dependents.

VII.

THE COURT OF APPEALS DID NOT FOLLOW *BROWN* IN HOLDING THAT THE SECRETARY HAD AUTHORITY TO IMPOSE A NEGLIGENCE FINDING AS A CONDITION PRECEDENT TO RECOVERY IN AN MCA CLAIM.

The Secretary has promulgated no regulations for claims brought under § 2734. Consequently, if § 2734 is applicable to Duncan's claim, the Secretary must rely solely on the language of the governing statute. 5 U.S.C. § 552(a)(1); 44 U.S.C. § 1507. Because there is no mention of negligence in § 2734, the Secretary cannot impose a negligence-fault requirement on § 2734 claims.

If § 2733 is deemed to be applicable, then the regulations at 32 C.F.R. §§ 536.1-.60 would apply to the extent they are not in conflict with the governing statutes or other provisions of the law. *Chevron*, 647 U.S. at 842-43.

32 C.F.R. § 536.23 requires that a claimant show, as a prerequisite to recovery under § 2733, that the complained of injury was caused

> by an act or omission determined to be negligent, wrongful, or otherwise involving fault of military personnel or civilian officers or employees of the Army acting within the scope of their employment.

The Court of Appeals held that this regulation was within the Secretary's authority.

To determine if a finding of negligence is a permissible interpretation of § 2733, *Chevron*, 467 U.S. at 842-43, requires

that the court look to the governing statute. It is significant to note that the cases relied upon by the Court of Appeals did not address the issue of whether the negligence requirement imposed by Army regulation is allowed by the governing statute.

Neither § 2733 nor § 2734 makes any mention whatsoever of fault or negligence on the part of the military or its employees. Section 2733 provides for recovery for personal injury or death which is "caused by a civilian officer or employee" or is "otherwise incident to noncombat activities of that department." 10 U.S.C. § 2733(a). Section 2734 provides for recovery for personal injury or death which occurs outside the United States and is "caused by a member [of the armed forces] or by a civilian employee of the military department concerned" or is "otherwise incident to noncombat activities of the armed forces under his jurisdiction." 10 U.S.C. § 2734(a).

Pursuant to *Chevron*, the issue becomes whether § 2733 authorizes adoption of § 536.23's negligence-fault requirement for injuries not incident to noncombat activities. (Noncombat activities include things such as training flights of airplanes and testing bombs.) *Brown v. Gardner*, __ U.S. __, 115 S. Ct. 552 (1994), is determinative on this issue.

In *Brown*, the Supreme Court addressed the identical question which is presented here, i.e., whether despite the absence from the statutory language of so much as a word about the fault of the agency in the governing statute, the agency can nonetheless impose a negligence requirement by regulation. The Court answered a resounding, "No." The Supreme Court held that because the governing statute had not made any mention of agency fault, "it would be unreasonable to read the text of [the governing statute] as imposing a burden of demonstrating it." *Id.* at 556.

The statute at issue in *Brown*, like § 2733, made reference to the fault of the claimant. The recovery of a claimant in a § 2733 claim is reduced to the extent that his own negligence would reduce his recovery under the law of the place where the injury occurred. 10 U.S.C. § 2733(b)(4). The Supreme Court found this "reference to the claimant's fault in a statute keeping silent about any fault on the [agency's] part" invokes the rule:

> [W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

Brown, 116 S. Ct. at 558, *quoting*, *Russello v. United States*, 464 U.S. 16, 23 (1983).

Because the text of the statute and reasonable inferences from it give a clear answer, that is the end of the matter. *Id.* at 556. Here, as in *Brown*, the Secretary may not impose a negligence-fault finding by the Army as a prerequisite to recovery in an MCA claim.

CONCLUSION

Accordingly, Barbara Duncan respectfully requests that her petition for writ of certiorari be granted.

Respectfully submitted,

MICKALE CARTER
Attorney for Petitioner
PSC 37 Box 2277
APO AE 09459

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED JUNE 24, 1998

Unpublished

United States Court of Appeals
for the Fourth Circuit

Barbara Duncan, personally and on behalf of her deceased child, Baby Boy Scott, Plaintiff-Appellant, v. Togo D. West, Jr., Secretary of the Army, Defendant-Appellee.

No. 97-1876

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.

T.S. Ellis, III, District Judge.

(CA-96-1648-A)

Submitted: June 2, 1998

Decided: June 24, 1998

Before Wilkinson, Chief Judge, and Ervin and Williams, Circuit Judges.

Affirmed by unpublished per curiam opinion.

* * *

Appendix A

Opinion

Per curiam:

Barbara Duncan appeals the district court's order dismissing her claim for a lack of subject matter jurisdiction. Finding no error, we affirm.

Duncan commenced an action on behalf of herself and her deceased child, seeking review of Secretary of the Army's disallowance of her administrative claim for medical malpractice under the Military Claims Act ("MCA"), 10 U.S.C.A. § 2733 (West 1983 & Supp. 1998). In September 1991, Duncan, the wife of an active duty soldier residing in Germany, sought health care at an Army medical facility in Darmstadt, Germany. Duncan, who was four months pregnant, complained of nausea, vomiting, diarrhea, a decreased appetite, and a burning sensation while urinating. A military doctor diagnosed gastroenteritis and advised her to increase her liquid intake and maintain a bland diet. She returned to the medical facility the next day and was seen by a civilian doctor participating in the Civilian Heath and Medical Program of Uniformed Services ("CHAMPUS") partnership program. Duncan was diagnosed with cystitis.

The next day, Duncan was seen by her gynecologist, a German doctor, and was hospitalized for the next ten days in a German hospital for bladder and kidney infections. Approximately three weeks after her release from the hospital, a German surgeon diagnosed appendicitis. Duncan's appendix had ruptured and she developed peritonitis. At the advice of a physician, she terminated her pregnancy resulting in the loss of Baby Boy Scott who was about 5 months' gestation.

Appendix A

Duncan filed an administrative claim against the United States Army alleging that both the military doctor and the civilian CHAMPUS doctor negligently failed to diagnose appendicitis resulting in a ruptured appendix, peritonitis, and premature termination of her pregnancy. The Army denied the claim, finding that the military doctor was not negligent under the circumstances and the CHAMPUS doctor was not a civilian officer or employee of the Army. Duncan appealed the decision to the Secretary of the Army. The appeal was denied and the claim disapproved. The notice denying the appeal stated that under 10 U.S.C. § 2735 (1994) the decision was "final and conclusive." Shortly thereafter, Duncan commenced the instant action in the district court.

Duncan made the following assertions below: (1) the Secretary's decision was not supported by the record; (2) the Secretary acted arbitrarily and capriciously in denying her claim; (3) the Secretary improperly applied the MCA to her claim instead of the Foreign Claims Act ("FCA"), 10 U.S.C.A. § 2734 (West 1983 & Supp. 1998); (4) a finding of negligence was not required; (5) the Secretary did not refer to general principles of tort law common to the majority of states as required by regulations; (6) the Secretary erred in finding that the Army was not liable for the conduct of the CHAMPUS doctors; (7) the Secretary erroneously applied certain provisions of the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1994); (8) the Secretary denied Duncan procedural due process by refusing to disclose certain information concerning the denial of the claim; and (9) the disparate treatment between military dependents injured in military facilities in foreign countries and military dependents injured in military facilities in the United States does not have a rational basis and violates principles of equal protection.

Appendix A

The district court found that the Secretary properly construed Duncan's claim as one under the MCA instead of the FCA. The court then found that 10 U.S.C. § 2735 (1994) barred judicial review of the Secretary's denial of Duncan's claim. The court also concluded that Duncan's complaint did not present a substantial violation of a constitutional protection, which may have been an exception to the bar against judicial review. *See Duncan v. West*, 965 F. Supp. 796 (E.D. Va. 1997). The instant appeal followed.

A dismissal for lack of subject matter jurisdiction is reviewed de novo. *See Republic of Paraguay v. Allen*, 134 F.3d 622, 626 (4th Cir.), *cert. denied*, __ U.S. __, 66 U.S.L.W. 3684 (U.S. Apr. 14, 1998) (Nos. 97-8214 (A-732), 97-1390 (A-738), 97-8660 (A-767)). Under 10 U.S.C. § 2735, "[n]otwithstanding any other provision of law, the settlement of a claim under section 2733, 2734, 2734a, 2734b, or 2737 of this tittle is final and conclusive." Settlement means to "consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance or by *disallowance.*" 10 U.S.C. § 2731 (1994) (emphasis added). Although this Court has not had occasion to address the issue, seven of our sister circuit courts that have considered it concluded that judicial review of a denial of a claim under the MCA is barred. *See Collins v. United States*, 67 F.3d 284, 288 (Fed. Cir. 1995); *Schneider v. United States*, 27 F.3d 1327, 1332 (8th Cir. 1994); *Hata v. United States*, 23 F.3d 230, 233 (9th Cir. 1994); *Rodrigue v. United States*, 968 F.2d 1430, 1434 (1st Cir. 1992); *Broadnax v. United States*, 777 F.2d 231, 233 (5th Cir. 1985); *Broadnax v. United States Army*, 710 F.2d 865, 867 (D.C. Cir. 1983); *LaBash v. United States Department of the Army*, 668 F.2d 1153, 1156 (10th Cir. 1982).

We find this weight of authority persuasive. It is well settled that the United States cannot be sued without its consent. *See Hercules Inc. v. United States*, 516 U.S. 417, 422 (1996). While there is a strong presumption that Congress intends judicial review of administrative action, the presumption can be defeated by "specific language or specific legislative history that is a reliable indicator of congressional intent,' or a specific congressional intent to preclude judicial review that is 'fairly discernible' in the detail of the legislative scheme." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670-73 (1986) (quoting *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349 (1984)). Section 2735 contains specific language indicating a congressional intent to bar judicial review. Because the Secretary's decision is final and conclusive, "notwithstanding any other provision of law," 5 U.S.C. § 702 (1994) of the Administrative Procedure Act cannot be a source for the court's authority to review the Secretary's decision.[1] *See Schneider*, 27 F.3d at 1330. Thus, judicial review of the Secretary's action is barred unless Duncan's allegations fall into one of two narrow exceptions.

Even though statutory language may bar judicial review, we recognize that review may nonetheless occur if the allegation concerns the agency exceeding the scope of its authority or violating a clear statutory mandate. *See Hanauer v. Reich*, 82 F.3d 1304, 1307 (4th Cir. 1996). In such circumstances, the court should conduct a cursory review of the merits of the allegation. Review is limited and available only in extraordinary circumstances. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964). In addition, constitutional claims regarding the denial of relief under § 2733 may, in some instances, be

1. Section 702 provides for a general cause of action for persons adversely aggrieved by a final agency decision.

reviewed. *See Schneider*, 27 F.3d at 1332; *Hata*, 23 F.3d at 233-34.

Even if review were possible under either exception, however, we nonetheless find the district court properly declined exercise jurisdiction. Duncan alleges a number of errors which could be construed as asserting that the Secretary exceeded the scope of his authority or violated a statutory mandate. However, we find these claims are without merit. The Secretary did not violate a statutory mandate by deciding the claim under the MCA rather than the FCA. The MCA is clearly applicable to Duncan's claim.[2]

Relief under the FCA is available only to foreign countries, political subdivisions of foreign countries, or "inhabitants" of foreign countries. *See* 10 U.S.C.A. § 2734. An "inhabitant" is "[o]ne who resides actually and permanently in a given place, and has his domicile there." Black's Law Dictionary 782 (6th ed. 1990). Thus, we conclude the Secretary has not clearly violated a statutory mandate by determining that Duncan was not an inhabitant for purposes of § 3734.

Nor is it a violation or in excess of the scope of authority to limit relief to those claims which show that military personnel were negligent in causing the injury. *See* 32 C.F.R. § 536.23(a)(1) (1997). Duncan's contention that the Secretary violated 32 C.F.R. § 536.6(1997) by not applying the prevailing

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2. Under 10 U.S.C.A. § 2733(a)(3), "[the Secretary] . . . or, subject to appeal to him, the Judge Advocate General of an armed force under his jurisdiction, or the Chief Counsel of the Coast Guard, as appropriate, if designated by him, may settle, and pay in the amount not more than $100,000, a claim against the United States for — . . . personal injury or death."

common law standard for general tort principles is merely an attempt to have the court review the merits of her personal injury claim. Furthermore, the Secretary did not act improperly by declining to award relief for any injury caused by the negligence of the CHAMPUS doctor. Under the MCA, in order for the Secretary to award relief, the injury must be "caused by a civilian officer or employee of" the Army. *See* 10 U.S.C.A. § 2733. It is within the secretary's authority, conferred by § 2733, to exclude independent contractors from the definition of civilian officers or employees. *See* 32 C.F.R. § 536.3. Duncan's claim that the Secretary's reliance upon the FTCA in creating its regulations is improper is without merit and has no bearing on the merits of Duncan's personal injury claim.

We agree with the district court that Duncan's constitutional claims are insufficient to permit an exception to the bar against judicial review. Even if the Secretary violated the regulations by not disclosing certain information or by not informing Duncan of the basis for the denial of the claim, there was no due process violation. Duncan received notice of the reasons for the denial. She then made use of the opportunity for review by the Secretary by submitting extensive argument, expert opinion and other materials. She received all the process she was due.

Equal protection claims like Duncan's have been considered and rejected by other circuit courts. *See Schneider*, 27 F.3d at 1332; *see also Heller v. United States*, 776 F.2d 92, 98 (3d Cir. 1985) (FTCA's provision denying relief to claims arising in foreign countries does not violate equal protection). We find a rational basis exists for granting judicial review under the FTCA while not providing the same opportunity to claimants proceedings under the MCA.

For the foregoing reasons, the district court's order is affirmed. Having previously granted Appellee's motion to submit this appeal on the briefs, we dispense with oral argument since the factual and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION DECIDED JUNE 4, 1997

Barbara Duncan, Plaintiff, v. Togo D. West, Jr., Secretary of the Army, Defendant.

C.A. No. 96-1648-A

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

965 F. Supp. 796; 1997 U.S. Dist.

June 4, 1997, Decided

* * *

JUDGES: Honorable T. S. Ellis, III, United States District Judge

OPINION BY: T. S. Ellis, III

This case presents the question, not yet resolved in this circuit, whether the U.S. Army's disallowance of an administrative claim for medical malpractice under the Military Claims Act ("MCA"), 10 U.S.C. § 2733, is subject to judicial review.[1]

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1. For the purpose of resolving defendants' motion to dismiss, the uncontroverted facts as alleged by plaintiff, the non-moving party, must be accepted as true. See Adams v. Bain, 697 F.2d 1213 (4th Cir. 1982); see generally 5A C. Wright & A. Miller, Federal Practice and Procedure, § 1350 at 218-220.

Appendix B

While stationed with her service member husband in Europe, plaintiff, Barbara Duncan ("Duncan"), received health care at the U.S. Army Health Clinic (4th General Dispensary), in Darmstadt, Federal Republic of Germany. On September 3, 1991, Duncan, who was four months pregnant, sought treatment at the U.S. Army Health Clinic for nausea, vomiting, and diarrhea associated with a decreased appetite. Captain Michael Pylman, a military physician, conducted a pelvic ultrasound examination, an abdominal examination, and urinalysis, concluding ultimately that Duncan suffered from gastroenteritis. Accordingly, Dr. Pylman advised Duncan to increase her intake of clear liquids, to maintain a bland diet, and to return to the military clinic if her symptoms persisted. Two days later, Duncan returned to the clinic complaining of continuing lower abdominal pain. Dr. Pylman referred her to Dr. Edwin Asemota, a civilian physician at the clinic.[2] Like Dr. Pylman, Dr. Asemota detected nothing beyond gastroenteritis.

On September 6, 1991, Duncan was hospitalized by a German physician, Dr. Wolfgang Cikrit, for a severe streptococcal infection and preterm labor and treated for ten days with intravenous antibiotics. Then, on October 4, 1991, Duncan was readmitted to the hospital by another German physician, Dr. H. H. Strack, for an exploratory laparotomy. The surgical procedure revealed generalized peritonitis with multiple

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2. In 1986, Congress created the "Military-Civilian Health Services Partnership Program." 10 U.S.C. § 1019. Under this program, the military services may enter into resource sharing agreements with civilian physicians, known as CHAMPUS (Civilian Health And Medical Program for the Uniformed Services) partners. These CHAMPUS partners, like Dr. Asemota, provide health care for military dependents in government medical facilities, using government equipment, supplies, and staff. See 32 C.F.R. § 199.1(p).

abscesses owing to a ruptured appendix. Because of a related loss of amniotic fluid, Duncan's German physicians advised her to terminate her pregnancy. She accepted this medical advice and an abortion was performed on October 26, 1991.

On August 31, 1993, Duncan filed an administrative claim against the United States in the amount of $2,000,000. Specifically, Duncan's claim alleged that Dr. Pylman's and Dr. Asemota's negligent failures to diagnosis and treat her appendicitis in a timely manner proximately resulted in a ruptured appendix, peritonitis, and premature termination of pregnancy. On December 21, 1994, the Army denied Duncan's claim.[3] In doing so, the Army determined that Duncan had presented none of the classic symptoms of acute appendicitis (with the possible exception of a low-grade fever) on her initial visit to the clinic on September 3. Therefore, the Army concluded that Dr. Pylman's evaluation and assessment were appropriate in the circumstances. Further, the Army ruled that Dr. Asemota, who evaluated Duncan on September 5, did not qualify as a "civilian officer or employee" of the Army, and, as a consequence, the United States was not liable for Dr. Asemota's purportedly negligent acts or omissions.

After receiving an extension of time, Duncan filed an administrative appeal on May 1, 1995. The appeal contained over seventy pages of argument, an expert opinion, and other materials. Additionally, Duncan's counsel submitted supplemental material and argument which, although untimely, was accepted and considered by the appellate review board. On October 22, 1996, the Secretary of the Army, by and through his delegate, rejected Duncan's appeal and denied her medical malpractice claim.

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3. The Army set forth the basis for the denial in a denial letter, which Duncan has attached to her complaint in this action.

Appendix B

On November 14, 1996, Duncan filed the instant action for judicial review of the Army's denial of her administrative claim. Then, on April 21, 1997, after the long-delayed service of the complaint,[4] defendant, Secretary of the Army Togo West, Jr., filed the instant motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), Fed. R. Civ. P. The Court heard oral argument and granted the motion to dismiss. Duncan v. West, C.A. No. 96-1648-A (Order, May 9, 1997). This Memorandum Opinion elaborates on the court's ruling from the bench.

II

The government contends that the Court lacks subject matter jurisdiction over Duncan's action because: (1) the MCA expressly precludes judicial review of the military's disposition of administrative claims; and (2) even assuming, arguendo, the existence of a "constitutional exception" to this general preclusion rule, Duncan fails to allege a cognizable constitutional claim. Duncan disagrees, arguing instead: (1) that the Army's decision to deny her administrative claim raises a federal question under the MCA and is subject to judicial review as final agency action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702; and (2) that defendant denied her due process and equal protection pursuant to the Fifth Amendment.

A

As a threshold matter, Duncan contends that the Army erred when it applied the MCA, instead of the Foreign Claims Act

4. Plaintiff's counsel stated at the hearing that the 97 day delay in serving defendant was occasioned by her busy schedule as a solo practitioner.

("FCA"), 10 U.S.C. 2734, to her medical malpractice claim.[5] Duncan's contention is unfounded. The FCA, by its express terms, applies only to a claimant who is an "inhabitant of a foreign country." 10 U.S.C. § 2734.[6] While Duncan contends that a military dependent is an "inhabitant of a foreign country" by virtue of his or her mere presence there, that contention contradicts the well-settled and consistent administrative interpretation of the FCA. In the regulations implementing the FCA, the Army expressly defines the phrase "inhabitant of a foreign country" to exclude dependents of military personnel who reside temporarily in a foreign country.[7] And this

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5. This threshold matter is merely academic. Since the judicial preclusion rule, 20 U.S.C. § 3735, applies to both the FCA and MCA, the analysis in part II.B is pertinent regardless of which statute the Army relied on in the circumstances.

6. The FCA provides, in pertinent part, that:

> (a) To promote and to maintain friendly relations through the prompt settlement of meritorious claims, the Secretary concerned, or an officer or employee designated by the Secretary, may appoint, under such regulations as the Secretary may prescribe, one or more claims commissions, each composed of one or more officers or employees or combination of officers or employees of the armed forces, to settle and pay in an amount not more than $100,000, a claim against the United States for —
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> (3) personal injury to, or death of, any inhabitant of a foreign country. . . .

7. The FCA authorizes the Secretary of the Army to promulgate such regulations. Thus, according to Army Regulation 27-20:

(Cont'd)

regulatory definition finds firm support in the plain and ordinary meaning of the statutory term "inhabitant." An "inhabitant" is "one who resides actually and permanently in a given place, and has his domicile there." Black's Law Dictionary (6th ed. 1990). Military dependents do not fall within this category. In short, the FCA does not apply to dependents of U.S. military personnel who temporarily reside outside the United States pursuant to military orders. Here, at the time of the events in question, Duncan was a permanent resident of this country; her transient presence in Germany was due only to her husband's military assignment. Accordingly, the Army properly construed her administrative claim as one asserted under the MCA, not the FCA.

B

The government argues that the Army's denial of Duncan's administrative claim deprives the Court of subject matter jurisdiction because the MCA explicitly precludes judicial review of "final and conclusive" decisions. Duncan contends that the MCA's "final and conclusive" language does not thwart judicial review, but merely prevents other federal agencies from reviewing and possibly rejecting the Army's proposed settlements of MCA claims. Thus, the dispositive issue here is whether the MCA prohibits claimants from seeking judicial review of the Army's determination.

(Cont'd)

> U.S. Military personnel . . . and their family members, who are normally residents of the United States and who, at the time of the incident giving rise to the claim, are residing in a foreign country primarily because of their own or their sponsor's duty or employment status, are not foreign inhabitants and are excluded from coverage under the FCA.

Appendix B

In considering whether a federal statute permits judicial review of a final administrative decision, it is important to recognize the existence of a strong presumption in favor of such review. Abbott Labs. v. Gardner, 387 U.S. 136, 140-41, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967); Block v. Community Nutrition Inst., 467 U.S. 340, 349, 81 L. Ed. 2d 270, 104 S. Ct. 2450 (1984). Even so, subject to certain constitutional constraints, this general anti-preclusion presumption is overcome where the statute in issue is "specific in withholding such review [or] upon its face give[s] clear and convincing evidence of an intent to withhold it." Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 671, 90 L. Ed. 2d 623, 106 S. Ct. 2133 (1986); see also Lindahl v. Office of Personnel Mgmt., 470 U.S. 768, 778-79, 84 L. Ed. 2d 674, 105 S. Ct. 1620 (1985).

Given this standard, analysis properly begins with the MCA's language, which authorizes the Secretary of the Army to promulgate regulations under which he or the Judge Advocate General "may settle, and pay in the amount not more than $ 100,000, a claim against the United States for . . . personal injury or death . . . caused by a civilian officer or employee . . . or a member of the Army . . . acting within the scope of his employment. . . ." 10 U.S.C. § 2733(a). Section 2731 of the Act broadly defines the term "settle" to include the "disallowance" of a claim. 10 U.S.C. § 2731.[8] Further, § 2735 of the Act provides that "notwithstanding any other provision of law, the settlement of a claim under section 2733 . . . of this title is final and conclusive." 10 U.S.C. § 2735.

The MCA could scarcely be clearer on its face. While Duncan argues that § 2735 does not overcome the presumption in favor

8. In full, § 2731 provides that: "in this chapter, 'settle' means consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance or by disallowance."

of judicial review, the provision's plain and unambiguous language makes unmistakably clear that the Army's determination is final in all circumstances. Significantly, section 2735 does not merely state that an agency decision is "final"[9] or "final and conclusive;"[10] instead, it says that the Army's decision is "final and conclusive" "notwithstanding any other provision of law." The phrase "notwithstanding any other provision of law" obviously precludes an action under the APA, which provides a general cause of action for persons adversely affected by an agency's decision. 5 U.S.C. § 702. To interpret § 2735 as allowing judicial review of the Army's decision, as Duncan argues, would render that phrase meaningless.

The question of whether the MCA precludes judicial review is unresolved in this circuit, but not elsewhere. The overwhelming weight of judicial authority, indeed seven circuits and numerous district courts, persuasively holds that § 2735 rebuts the presumption in favor of judicial review of an adverse administrative decision.[11] There is only one contrary

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9. See, e.g., Shaughnessy v. Pedreiro, 349 U.S. 48, 51-52, 99 L. Ed. 868, 75 S. Ct. 591 (1955) (holding that the Immigration Act of 1952, which provides that deportation orders of the Attorney General shall be "final," prevents further administrative review, but not judicial review).

10. See, e.g., Lindahl v. Office of Personnel Mgmt., 470 U.S. 768, 791, 84 L. Ed. 2d 674, 105 S. Ct. 1620 (1985) (finding that the Civil Service Retirement Act, which provides that decisions concerning disability retirement determinations are "final and conclusive," precludes only judicial review of agency fact-finding).

11. See, e.g., Collins v. United States, 67 F.3d 284, 288 (Fed. Cir. 1995); Schneider v. United States, 27 F.3d 1327, 1332 (8th Cir. 1994), (Cont'd)

decision.[12] Duncan urges the Court to conclude, as did that lone district court, that Congress intended judicial review of settlements under the MCA. But that interpretation of § 2735 is unpersuasive in light of the MCA's plain and unambiguous language to the contrary.

Further, numerous district courts have held that § 2735 precludes judicial review of MCA claim settlements by disallowance. See, e.g., Niedbala v. United States, 37 Fed. Cl. 43, 50 (1996); Hass v. United States Air Force, 848 F. Supp. 926, 933 (D. Kan. 1994); MacCaskill v. United States, 834 F. Supp. 14, 17 (D.D.C. 1993), aff'd, 306 U.S. App. D.C. 356, 24 F.3d 1464 (D.C. Cir. 1994); Vogelaar v. United States, 665 F. Supp. 1295, 1298 (E.D. Mich. 1987); Bryson v. United States, 463 F. Supp. 908, 910 (E.D. Pa. 1978); Towry v. United States, 459 F. Supp. 101, 107-08 (E.D. La. 1978), aff'd, 620 F.2d 568 (5th Cir. 1980), cert. denied, 449 U.S. 1078, 66 L. Ed. 2d 801, 101 S. Ct. 858 (1981).

C

The conclusion that the MCA precludes judicial review of Army decisions to deny MCA claims does not end the analysis. Courts

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cert. denied, 513 U.S. 1077, 130 L. Ed. 2d 628, 115 S. Ct. 723 (1995); Hata v. United States, 23 F.3d 230, 233 (9th Cir. 1994); Rodrigue v. United States, 968 F.2d 1430, 1434 (1st Cir. 1992); Poindexter v. United States, 777 F.2d 231, 233 (5th Cir. 1985); Broadnax v. United States Army, 228 U.S. App. D.C. 354, 710 F.2d 865, 867 (D.C. Cir. 1983); Labash v. United States Dept. of the Army, 668 F.2d 1153, 1156 (10th Cir.), cert. denied, 456 U.S. 1008, 73 L. Ed. 2d 1303, 102 S. Ct. 2299 (1982).

12. See Welch v. United States, 446 F. Supp. 75 (D. Conn. 1978).

have appropriately recognized that the MCA's preclusion of judicial review can be overcome if constitutional violations can be established. See, e.g., Hata, 23 F.3d at 233; Poindexter, 777 F.2d at 234; Rhodes v. United States, 760 F.2d 1180, 1184-85 (11th Cir. 1985); Niedbala, 37 Fed. Cl. at 51. Here, Duncan contends that her complaint raises six legal questions and two constitutional concerns that justify judicial review of the Secretary's decision pursuant to the "constitutional exception" to the statutory preclusion of review.

As an initial matter, Duncan's six legal claims are not of constitutional stature and, as a consequence, do not call into play the "constitutional exception."[13] Further, Duncan's two

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13. Specifically, Duncan alleges that:

(1) the MCA's regulations inappropriately impose a fault requirement as a condition precedent to recovery;

(2) the Secretary violated Army regulations by failing to apply the generally accepted principles of agency law to determine whether Dr. Asemota, the CHAMPUS partner physician, was indeed an "employee";

(3) the Secretary violated the MCA by applying the independent contractor exception of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671, to her administrative claim;

(4) Section 2680(k) of the FTCA precludes the Secretary's reliance on FTCA jurisprudence to deny her MCA claim;

(5) the Secretary's conclusion concerning Dr. Pylman's evaluation and assessment was wrong; and

(Cont'd)

conclusory allegations of constitutional violations also lack merit. First, Duncan claims that the Secretary denied her procedural due process by failing to inform her of the basis for denying her claim. Specifically, Duncan alleges that she requested, but did not receive, "information concerning the employment relationship the Army had with the civilian doctor" and a "copy of the expert report upon which the Secretary based his apparent conclusion that the conduct of the doctors did not breach the standard of care," all in violation of AR 27-20, paragraph 3-17d.[14]

This claim fails for several reasons. Even assuming, arguendo, that the Army violated the regulations, its action did not offend the constitution. Not every failure by an administrator to adhere to his or her agency's rules offends due process. "Rather, the due process clause is only implicated when an agency violates regulations 'mandated by the Constitution or federal law'. . . ." Palmer v. Merluzzi, 689 F. Supp. 400, 411 (D. N.J. 1988) (quoting United States v. Caceres, 440 U.S. 741, 59 L. Ed. 2d 733, 99 S. Ct. 1465 (1979)). The regulation at issue here is not statutorily or constitutionally based or required. And, in any

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(Cont'd)

(6) the Secretary's discretion to disallow the MCA claims of dependents who temporarily resider overseas amounts to a breach of the military's statutory and contractual obligation to provide quality health care.

Notwithstanding Duncan's contentions, none of these purported legal errors support the exercise of jurisdiction in this instant case.

14. That regulation provides that: "A request by the claimant for access to documentary evidence in the claims file to be used in considering the appeal may be granted unless access is not permitted by law or regulation."

event, the Army's denial letter provided Duncan with sufficient notice of the bases for denying her claim. Duncan received all the process she was constitutionally due. Further, there was no regulatory violation. AR 27-20, by its terms, did not require the Army to furnish the requested documents. Thus, the regulation applies only to "documentary evidence in the claims file" and Duncan's counsel was advised on August 26, 1996 that the Army did not have a copy of Dr. Asemota's partnership agreement in its files. Moreover, the regulation expressly denies access not permitted "by law or regulation." The provisions of 10 U.S.C. § 1102 (quality assurance records) and Department of Army Pamphlet 27-162, paragraph 5-13 (privileged reports prepared by the Department of Legal Medicine) authorized the Army to withhold from Duncan the documents containing the medical opinions of its experts.

Second, Duncan invokes equal protection in an attempt to identify a colorable constitutional claim. Specifically, she alleges that "there is no rational basis for the extreme level of disparate treatment between military dependents injured in military health care facilities in the United States and military dependents injured in military health care facilities in foreign countries." In other words, Duncan complains about the fact that judicial review is available for an agency's administrative settlement of FTCA claims, but not MCA claims.[15]

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15. Duncan has no cause of action under the FTCA because it excludes from its remedial scheme a cause of action for a governmental tort committed in a foreign country. 28 U.S.C. § 2680(k). And since the government has not waived its sovereign immunity when a tort is committed in a foreign country, Duncan's only remedy lies within the scheme of the MCA, which precludes judicial review of the disallowance of her claim.

Appendix B

This claim is not new; it has been previously raised and soundly rejected. In Schneider v. United States, 27 F.3d 1327 (8th Cir. 1994), plaintiffs, who alleged medical malpractice in an overseas military hospital, also argued that the MCA deprived them of equal protection "because it precludes judicial review while similarly situated litigants under the FTCA are entitled to bring suit." Id. at 1332. The Eighth Circuit dismissed the claim, concluding that plaintiffs "are not similarly situated to persons injured by governmental torts within the United States" and that, in any event, "the distinction between victims within the United States and victims in a foreign country is . . . rational." Id. And in Heller v. United States, 776 F.2d 92 (3d Cir. 1985), the Third Circuit reached the same result by identifying another rational explanation for this distinction: "It is well-recognized that the [MCA's] administrative claims procedure is an appropriate balance between individual rights and Congress' desire to avoid the disruptive effect that judicial review may have on 'the prompt and authoritative administrative settlement of claims' against the military." Id. at 98 (citation omitted). In short, Duncan's equal protection claim, distilled to its essence, merely reflects her disagreement with Congress' decision to entrust the Secretary of the Army with unreviewable authority to resolve MCA claims. This disagreement is not a basis for finding a violation of equal protection.

For the foregoing reasons, Duncan has not demonstrated a substantial violation which might fall within the "constitutional exception" to § 2735. Because of her failure to do so, the motion to dismiss was granted and an appropriate Order has already issued.

The Clerk is directed to sendcopies of this Memorandum Opinion to all counsel of record.

Appendix B

T.S. Ellis, III

United States District Judge

Alexandria, Virginia

June 4, 1997

APPENDIX C — MILITARY CLAIMS ACT 10 U.S.C. §§ 2731-2737

Military Claims Act

10 U.S.C. §§ 2731-2737

Relevant provisions

2731. Definition

> In this chapter, "settle" means consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance or by disallowance.

2733. Property loss; personal injury or death: incident to noncombat activities of Department of Army, Navy, or Air Force

> (a) Under such regulations as the Secretary concerned may prescribe, he, or, subject to appeal to him, the Judge Advocate General of an armed force under his jurisdiction, or the chief Counsel of the Coast Guard, as appropriate, if designated by him, may settle, and pay in an amount not more than $100,000, a claim against the United States for —
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> . . .
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> > (3) personal injury or death; either caused by a civilian officer or employee of that department, or the Coast Guard, or a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be, acting within the scope of his employment, or otherwise incident to

noncombat activities of that department, or the Coast Guard.

(b) A claim may be allowed under subsection (a) only if -

. . .

(4) the damage to, or loss of, property, or the personal injury or death, wasnot caused wholly or partly by a negligent or wrongful act of the claimant, his agent, or his employee; or, if so caused, allowed only to the extent that the law of the place where the act or omission complained of occurred would permit recovery from a private individual under like circumstances; and 5) it is substantiated as prescribed in regulations of the Secretaryconcerned.

2734. Property loss; personal injury or death: incident to noncombat activities of the armed forces; foreign countries

(a) To promote and to maintain friendly relations through the prompt settlement of meritorious claims, the Secretary concerned, or an officer or employee designated by the Secretary, may appoint, under such regulations as the Secretary may prescribe, one or more claims commissions, . . . to settle . . . a claim against the United States for — . . .

(3) personal injury to, or death of, any inhabitant of a foreign country; if the damage, loss, personal injury, or death occurs outside the United States, or

Appendix C

the Territories, Commonwealths, or possessions, and is caused by, or is otherwise incident to noncombat activities of, the armed forces under his jurisdiction, or is caused by a member thereof or by a civilian employee of the military department concerned or the Coast Guard, as the case may be. . . . In this section, "foreign country" includes any place under the jurisdiction of the United States in a foreign country. . . .

(b) A claim may be allowed under subsection (a) only if —

(1) it is presented within two years after it accrues;

(2) in the case of a national of a country at war with the United States, or of any ally of that country, the claimant is determined by the commission or by the local military commander to be friendly to the United States; and

(3) it did not arise from action by an enemy or result directly or indirectly from an act of the armed forces of the United States in combat, except that a claim may be allowed if it arises from an accident or malfunction incident to the operation of an aircraft of the armed forces of the United States, including its airborne ordnance, indirectly related to combat, and occurring while preparing for, going to, or returning from a combat mission . . .

Appendix C

2735. Settlement: final and conclusive

Notwithstanding any other provision of law, the settlement of a claim under section 2733, 2734, 2734a, 2734b, or 2737 of this title is final and conclusive.

APPENDIX D — ARMY REGULATIONS 32 C.F.R. §§ 536.1-536. 97

Army Regulations

Claims Against the United States

32 C.F.R. §§ 536.1-536. 97

Relevant provisions

536.1 Purpose and scope.

(a) Purpose. Part 536 prescribes policies and procedures to be followed in the filing, investigation, processing and administrative settlement of Department of Army (DA) generated noncontractual claims. Sections 536.1 through 536.13 contain general instructions and guidance for the investigation and processing of claims and apply to all claims unless other laws or regulations specify other procedures. . . .

(iii) Section 536.50 governs the administrative settlement of claims under the Federal Tort Claims Act (FTCA) (28 U.S.C. 1346(b), 2671-2680) for personal injury, death or property damage caused by the negligent act or omissions of members or employees of the DA while acting within the scope of their employment. . . .

536.6 Determination of liability.

(a) In the adjudication of tort claims, the liability of the United States generally is determined in

accordance with the law of the State or country where the act or omission occurred, except that any conflict between local law and the applicable United States statute will be resolved in favor of the latter. However, in claims by inhabitants of the United States arising in foreign countries, liability is determined in accordance with general principles of tort law common to the majority of American jurisdictions as evidenced by Federal case law and standard legal publications, except as it applies to absolute liability. Where liability is not clear or other issues exist, settlements should truly reflect the uncertainties in the adjudication of such issues. Compromise settlements are encouraged provided agreement can be reached that reflects the reduced value of the damages as measured against the full value or range of value if such uncertainties or issues did not exist and were it possible for the claimant to successfully litigate the claim.

536.11 Appeals and notification to claimant as to denial of claims.

. . . (c) Denials under the MCA (10 U.S.C. 2733) Secs. 536.20 through 536.35 and the NGCA (32 U.S.C. 715) Secs. 536.70 through 536.81. Claims disapproved under these statutes are subject to appeal and the claimant will be so informed. Also, the notice of disapproval will be sufficiently detailed to provide the claimant with an opportunity to know and attempt to overcome the basis for the disapproval. The claimant should not be afforded a valid basis for claiming surprise when an issue

adverse to him is asserted as a basis for denying his appeal.

536.20 Statutory authority.

The statutory authority for Secs. 536.20 through 536.35 is contained in the Act of 10 August 1956 (70A Stat. 153, 10 U.S.C. 2733) commonly referred to as the Military Claims Act (MCA), as amended by Public Law. . . .

536.23 Claims payable.

(a) General. Unless otherwise prescribed, a claim for personal injury, death, or damage to or loss of real or personal property is payable under Secs. 536.20 through 536.35 when —

(1) Caused by an act or omission determined to be negligent, wrongful, or otherwise involving fault of military personnel or civilian officers or employees of the Army acting within the scope of their employment, or

(2) Incident to the noncombat activities of the Army. . . .

(c) Effect of FTCA. A claim arising in the United States may be settled under Secs. 536.20 through 536.35 only if the FTCA (28 U.S.C. 2671-2680), Sec. 536.50, has been judicially determined not to be applicable to claims of this nature, or if the claim arose incident to noncombat activities.

Appendix D

536.24 Claims not payable.

A claim is not payable under Secs. 536.20 through 536.35 which —

(a) Results wholly from the negligent or wrongful act of the claimant or agent. . . .

(k) The types of claims not payable under the FTCA (see Sec. 536.50(j)) are also not payable under Secs. 536.20 through 536.35 with the following exceptions:

(1) The foreign country exclusion in 28 U.S.C. 2680(k) does not apply to claims under Secs. 536.20 through 536.35.

(2) The Feres bar in Sec. 536.50(j)(1) does not apply to claims under Secs. 536.20 through 536.35, but see the exclusion in paragraph (j) of this section.

536.27 Procedures.

So far as not inconsistent with Secs. 536.20 through 536.35, the procedures set forth in Secs. 536.1 through 536.13 will be followed.

536.28 Law applicable.

(a) As to claims arising in the United States, its territories, commonwealths, and possessions, the law of the place where the act or omission occurred

Appendix D

will be applied in determining liability and the effect of contributory negligence on claimant's right to recover damages.

(b) In claims arising in a foreign country, liability of the United States will be assessed by reference to general principles of tort law common to the majority of United States jurisdictions. Absolute liability and similar theories are not a basis for liability under this section. Damages will be determined under Sec. 536.29. If the negligence of the claimant was a partial cause of the injury, loss or damage, recovery will be barred if the negligence of the claimant is greater than that of the United States. In traffic accident cases, questions of negligence, and the degree of the claimant's comparative negligence, will be evaluated based on the traffic and vehicle safety laws and regulations of the country in which the accident occurred, but only to the extent they are not specifically superseded or preempted by the United States military traffic regulations.

536.32 Settlement procedures.

(a) Procedures. Approval and settlement authorities will follow the procedures set forth in Secs. 536.1 through 536.13 in paying, denying or making final offers on claims. A copy of the notification will be forwarded to Commander, USARCS. The settlement authority will notify the claimant by certified mail (return receipt registered) of a denial or final action and the reason therefore. . . .

(5) Where a claim for the same injury has been filed under the FTCA and the denial or final offer applies equally to such claim, the letter of notification must advise the claimant that any suit brought as to any portion of the claim under the FTCA must be brought not later than 6 months from the date of mailing of the notice of denial or final offer. Further, the claimant must be advised that if suit is brought, action on any appeal will be held in abeyance pending final determination of such suit.

(b) Action on appeal. (1) The appeal will be examined by the settlement authority who last acted on the claim, or his or her successor, to determine if the appeal complies with the requirements of this section. The settlement authority will also examine the claims investigative file and decide whether additional investigation is required; ensure all allegations or evidence presented by the claimant, agent or attorney are documented in the file; and that all pertinent evidence is included in the file. If the claimant states that he or she appeals but does not submit supporting materials within the 60 day appeal period or an approved extension thereof, the appeal will be treated as being on the record as it existed at the time of denial or final offer. Unless action under paragraph (b)(2) of this section is taken; the claim with complete investigative file including any additional investigation required and a memorandum of opinion will be forwarded to the appropriate appellate authority for necessary action on the appeal.

(2) If the evidence in the file, including information submitted by the claimant with the appeal and any necessary additional investigation, indicates that the appeal should be granted, in whole or in part, the settlement authority who last acted on the claim or his or her successor will attempt to settle the claim. If settlement cannot be reached, the appeal will be forwarded in accordance with paragraph (b)(1) of this section.

(3) As to an appeal that requires action by TJAG, The Assistant Judge Advocate General (TAJAG), or the Secretary of the Army, or designee, the Commander, USARCS may take the action in paragraph (b)(2) of this section or forward the claim together with a recommendation for action. All matters submitted by the claimant will be forwarded and considered.

(4) Since an appeal under this authority is not an adversary proceeding, no form of hearing is authorized. A request by the claimant for access to documentary evidence in the claims file to be used in considering the appeal should be granted unless access is not permitted by law or regulation.